

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

MARGARET FRAZIER,

Plaintiff,

vs.

JO ANN B. BARNHART¹, Acting
Commissioner of Social
Security,

Defendant.

No. 98-CV-4071-DEO

ORDER

This matter comes before the Court upon Plaintiff's motion for "Application For Attorney's Fees (EAJA Fees) For Federal Court Work & For Proceedings Upon Remand Of These SSI Claims" (Docket #24), and for Plaintiff's "Application For Entry of Formal Judgment" (Docket #23).

After careful consideration of the parties' written and oral arguments, as well as the relevant law, Plaintiff's motion for attorney's fees is sustained. Plaintiff's motion for entry of formal judgment is sustained.

I. PROCEDURAL HISTORY

On April 29, 1998, the Appeals Council denied the Plaintiff

¹Jo Anne B. Barnhart became the Acting Commissioner of Social Security on November 14, 2001. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Jo Anne B. Barnhart should be substituted for Larry G. Massanari as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. §405(g).

social security benefits. An appeal was filed with this Court on June 26, 1998. This Court entered an order on July 27, 1999 remanding this action for further proceedings pursuant to the sixth sentence of 42 U.S.C. 405(g) (Docket #18). On January 12, 2000, the ALJ issued a decision in favor of the Plaintiff, finding that she qualified for benefits as of November 1, 1996. On January 17, 2000, Plaintiff's counsel asked the ALJ and the Appeals Council to reconsider the date for the commencement of benefits, noting the impact that decision could have on the pending July 25, 1997 (third SSI application) then still before the Appeals Council. On February 2, 2000, the ALJ issued an Amended Decision complying with the Plaintiff's Request for Reconsideration and changing the onset date for benefits to October 11, 1996. A Notice of Award was issued on February 14 and an Amended Notice of Award was issued on February 24, 2000. On July 17, 2001, the Appeals Council formally approved the ALJ's Amended Decision issued on February 2, 2000.

The Amended Notice of Award states that Plaintiff is owed \$12,599.63 in back pay for the time period of October 11, 1996 through February, 2000. The Plaintiff prays that this Court enter a final judgment for the Plaintiff in the amount of \$12,599.63 consistent with the Amended Notice of Award.

On January 26, 2000, counsel for the Plaintiff submitted a petition for approval of fees to the ALJ, which did not include time spent in this Federal Court on this matter. The ALJ authorized a \$5,000.00 attorney fee, which did not include Plaintiff's attorney's expenses.

Plaintiff's attorney asks this Court to award attorney's fees pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412, for 52.1 hours of attorney work at the EAJA rate, and 7.9 hours of paralegal work at \$75.00 per hour (\$592.50).

II. FINAL JUDGMENT/NOTICE OF AWARD

At the time this Court held a hearing, Plaintiff's attorney argued that the Social Security Administration had only paid the Plaintiff \$12,288.63 out of the \$12,599.63 due to her, and was \$311.63 short. Since the hearing, the Court has been informed that the Social Security Administration has paid the Plaintiff the entire \$12,599.63 due her. This matter is therefore denied as moot.

III. ATTORNEY'S FEES

A. Timeliness of Application

On October 11, 2000, this Court entered an order (Docket #22) where it in effect terminated the case, stating:

[t]he Court has now been informed by counsel for the government that the Commissioner entered a final decision in this matter... Based upon this report, it appears that this matter should be terminated.... this matter is reconciled and settled, and is now terminated.

In its initial response to Plaintiff's motion for attorney's fees and application for formal judgment, the Defendant argued that the above mentioned order constituted a final judgment and thus, Plaintiff's attorney was late in filing his application

for attorney's fees.² After reconsidering this issue, the Defendant acknowledged that the Court did not file a separate Rule 58 judgment when it terminated the case in its Order of October 11, 2000. The filing of a separate Rule 58 judgment controls the time period during which an application for attorney fees under the EAJA may be filed. Shalala v. Schaefer, 509 U.S. 292, 303 (1993).

Therefore, the Defendant has acknowledged that because no separate Rule 58 judgment was entered by this Court, Plaintiff's application for attorney's fees is timely and this Court has jurisdiction to consider it.

B. Standard of Review

Reasonable attorneys fees may be awarded pursuant to the Equal Access to Justice Act (EAJA), 23 U.S.C. § 2412, to plaintiffs who prevail in Social Security cases. See Stockton v. Shalala, 36 F.3d 49, 50 (8th Cir. 1994). The statute provides:

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in

² Under 42 U.S.C. §2412(d)(1)(B), Plaintiff's attorney must file a request for attorney fees with a 30-day period that begins after the entry of a final judgment and the expiration of the 60-day appeal period. If October 11, 2000 had been the date of the entry of final judgment, Plaintiff's attorney would have had until January 11, 2001, 30 days after the appeal period expired, to file his application for attorney's fees under the Equal Access to Justice Act (EAJA). Plaintiff's attorney filed his application on September 21, 2001.

any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statutes which specifically provides for such an award.

28 U.S.C. § 2412 (b). The reasonable hourly rate for such attorneys fees and certain exceptions to that rate are also established by statute:

[A]ttorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

28 U.S.C. § 2412 (d)(2)(A)(ii). The Eighth Circuit Court of Appeals has recognized that cost-of-living adjustments may be made to the statutory hourly rate for awards made after the statutory rate was enacted. Stockton, 36 F.3d at 50. That Court has explained that although a cost-of-living adjustment may be made, "no enhancement for the attorney's expertise is justified [in a] straightforward social security disability case that did not involve particularly difficult or complex issues." Id.

In addition, the Appeals Court has also explained that courts may reduce the number of hours claimed if they are excessive, substituting the court's judgment of the number of hours that "reasonably and adequately accounts for the

attorney's court-related services." Id. The district courts have the authority to evaluate and determine the fees of an attorney because they are "in the best position to evaluate counsel's services and fee requests, particularly when the court has had the opportunity to observe, first-hand, counsel's representation on the substantive aspects of the disability claim." Hickey v. Secretary of HHS, 923 F.2d 585, 586.

C. Arguments & Analysis

The Court turns now to its consideration of Plaintiff's motion for application of attorney's fees.

The Government argues that its position was reasonable and substantially justified. In support of its argument, the Government asserts that "Plaintiff received a favorable decision after remand based primarily on evidence not submitted to the ALJ who had denied her claim on April 25, 1997" (Docket #28, p.4). Further, the Government argues that because the Plaintiff changed her disability onset date from February 1, 1995 to October 11, 1996, that Plaintiff concedes that the ALJ was correct in denying her claim for the period prior to October 11, 1996. Id. "A reasonable person, [therefore,] could have agreed with the ALJ on April 25, 1997, that Plaintiff was not disabled." Id. The Government, thus argues that "[b]ecause the ALJ's decision on April 25, 1997, was reasonable and substantially justified, Plaintiff's application for EAJA fees should be denied." Id.

The Plaintiff argues that she did not concede that the ALJ was correct in denying her claim for the period prior to October

11, 1996, and therefore did not waive two years of benefits. In support of this argument she points to the fact that the corrected ALJ decision setting the disability onset date at October 11, 1996 was based upon a second filing date of March 27, 1996 (Docket #29 at 1-2). Plaintiff originally filed her first application for SSI on March 8, 1995. (Tr. 187-201). This application was denied at the first level on April 14, 1995, and Plaintiff did not appeal. In an order dated July 27, 1999, this Court precluded the Plaintiff from reopening that initial 1995 claim. Therefore, the Plaintiff argues that she did not relinquish two years of benefits upon remand when she appeared before the second ALJ – she was just “unable to go back further than [March] 1996, the date of her second application” (Docket #29 at 2).

This Court is not persuaded that the Plaintiff conceded that the ALJ was correct in denying her claim for the period prior to October 11, 1996. The fact that Plaintiff changed her disability onset date from February 1, 1995 to October 11, 1996, was a result of this Court’s order of July 27, 1999, which precluded Plaintiff from reopening her initial 1995 claim and going back that far. Therefore, the change in onset date is not a reason to find that the Government’s position was substantially justified.

In addition, Plaintiff argues that her application for attorney’s fees should be granted because the ALJ failed to fully develop the record. Specifically, the Plaintiff points to medical records which include the results of an MRI taken on

March 5, 1997 "which made it very evident that Margaret had severe back pain including pinched nerves from herniations in her back" (Docket #29 at 3). These medical records were sent to the Appeals Council as soon as the Plaintiff hired an attorney (her current attorney Dennis Mahr). The Appeals Council admitted receiving that evidence (Tr. 5-7), but the case was not remanded for a new hearing. Additionally, while being unrepresented at the hearing on February 25, 1997, the Plaintiff had alerted the ALJ of the situation by saying: "I am returning to see Dr. Porter on February 27, 1997 to check for a herniated disk or spurs on my spine." (Tr. 144). Thus, the Plaintiff argues that "[h]ad the ALJ written Dr. Gordon A. Porter and/or Dr. Mitchell and developed the record prior to his Decision, he would have discovered that MRI and Dr. Mitchell's opinions" (Docket #29 at 3).

As to the MRI, the Court is persuaded that the Government's position was unreasonable and not substantially justified. The MRI clearly established that Plaintiff had a herniated disk and was disabled. The ALJ and or the Appeals Council knew the Plaintiff had no lawyer and that she didn't know anatomy and medical terms. A bad MRI should be a red flag to any ALJ. The fact that the Appeals Council did not remand the case in light of this evidence is clearly unreasonable. This laxity only adds to the reasons for finding that the ALJ did not adequately develop the record before making his decision.

The Plaintiff also argues that since Plaintiff had a second lumbar epidural steroid injection on March 25, 1997, twenty days

before the ALJ's decision denying her benefits (April 25, 1997), that the ALJ should have found out about this second injection, considered it and found for the Plaintiff, if he had properly developed the record prior to his denial of benefits on April 25, 1997. This particular claim is unreasonable. An ALJ cannot be expected to make phone calls, just before issuing his decision, to foreclose his being alerted to some new procedure that happened in the last few days.

The Court finds that the government failed to carry its "burden of proving that . . . [the ALJ'S decision] was substantially justified." Roberts v. Bowen, 652 F. Supp. 276, 278 (N.D. Iowa 1986). This Court finds that EAJA fees should be awarded because the ALJ's decision was not substantially justified and Plaintiff's benefits should not have been denied in light of the fact that the MRI report, showing serious injuries, was, in effect, ignored by the Appeals Council.

Plaintiff's attorney requests an hourly rate adjusted for inflation to be calculated by this Court. The motion also asks for reimbursement for paralegal fees in the amount of \$75.00 per hour for 7.9 hours for a total of \$592.50.

IT IS HEREBY ORDERED that Plaintiff's motion for entry of final judgment is sustained. Judgment for plaintiff in the amount set out in the Notice of Award in the sum of \$12,599.63 shall be entered.

IT IS FURTHER HEREBY ORDERED that Plaintiff's application for attorney's fees is timely.

IT IS FURTHER HEREBY ORDERED that the Plaintiff did not

waive two years of benefits since she was unable to go back to determine a starting date to any date prior to the date of her second application.

IT IS FURTHER HEREBY ORDERED that the 52.1 hours claimed for attorney's fees are reasonable. The Court further finds that a cost of living increase of the hourly fee to \$142.50 is appropriate in this case. The Court also finds that a total fee of \$7,424.25 and the paralegal fees claimed in the sum of \$75.00 per hour for 7.9 hours for a total of \$592.50, "reasonably and adequately accounts for the attorney's court related services." Stockton v. Shalala, 36 F.3d 49, 50 (8th Cir. 1994).

THEREFORE, Plaintiff's motion for award of EAJA attorney's fees is granted, and the Court awards attorney's fees of \$7,424.25 to the Plaintiff, and reimbursement for paralegal fees in the amount of \$592.50, pursuant to 28 U.S.C. §2412.

IT IS SO ORDERED.

DATED this ____ day of February, 2002.

Donald E. O'Brien, Senior Judge
United States District Court
Northern District of Iowa